


MEMORANDUM

DATE: May 8, 2013

TO: The Chesapeake Bay Board

FROM: Michael D. Woolson, Senior Watershed Planner 

SUBJECT: Natural Open Space / Conservation Easement – 87 Kestrel Court

Mr. John Robillard, residing at 87 Kestrel Court in the Season's Trace subdivision, has filed an appeal to the James City County Chesapeake Bay Board (Board) on April 12, 2013. Mr. Robillard is appealing a decision denying the placement of a play set and shed in the dedicated conservation easement on his property. The plat of subdivision was recorded on 23 January 1996 in Plat Book 63, Page 49 and the Deed of Easement for Natural Open Space was recorded on 23 January 1996 in Deed Book 771, pages 662, 663, 664, 665, and 666. The natural open space easement contains 3.07 acres of land that shall remain in its natural condition with respect to ground cover and woody vegetation as part of the subdivision's stormwater management practices. On March 31, 2013, via email correspondence, Mr. Robillard requested permission to install a play set and shed on a portion of his property that is within the natural open space easement. On April 9, 2013, staff responded that the structures were not a permissible use in the easement, per condition #1 of the easement.

Background Information

On August 24, 2012, an anonymous complaint was filed with the Engineering and Resource Protection Division regarding the placement of "tons of dirt in the back part of the yard." Staff investigated the complaint from a potential land disturbing violation perspective and found that there had been no land disturbing violation. The homeowner was repairing minor erosion and drainage problems along the right side and the rear of the house. Staff did however determine at that visit that a violation of the natural open space easement and resource protection area had occurred sometime in the past. In other words, during the course of the repair work taking place in 2012, no woody vegetation or ground cover (other than turf grass) had been removed or disturbed. After further office investigation of County files, no record of written permission could be located approving the previous disturbance to the natural open space easement or resource protection area.

Subsequently, staff sent a Notice of Violation on January 17, 2013 as an official notification that the clearing that had taken place on the property within the limits of the resource protection area and natural open space easement was a violation of both the terms of the easement and of the Chesapeake Bay Preservation Ordinance ("Ordinance"). Mr. Robillard did contact staff within the 30 day time frame set forth by the Notice to schedule a time to meet and discuss the matter.

On February 20, 2013, a meeting took place between Mr. Robillard, Mr. Woolson and Mr. Thomas to discuss the issues. Mr. Robillard stated that he bought the house in 2009 with the rear yard already established. He also stated that he would be willing to interplant in the existing woods but would not be willing to lose any of his backyard. He went on to state that because the County had not acted upon this issue before he bought the property, a 'defacto' variance was granted permitting all of the clearing to remain. That meeting was adjourned with the understanding that Mr. Thomas and Mr. Woolson would schedule an on-site meeting later to discuss the issues with Mr. Robillard. That meeting never materialized.

As stated previously in the email sent on March 31, 2013 by Mr. Robillard, he stated he was planning on installing a play set and shed on his property. Mr. Woolson responded that these two items were not permissible uses in the conservation easement.

Rational for the Chesapeake Bay Board as the Appellant Body for Natural Open Space

The Chesapeake Bay Preservation Ordinance ("Ordinance"), Section 23-9(b)(8) states that for any development, "stormwater runoff shall be controlled by the use of BMPs that are consistent with the water quality protection provision (4 VAC 3-20-71 et seq.) of the Virginia Stormwater Management Regulations (4 VAC 3-20). This consistency shall be demonstrated by compliance with the criteria and BMP facilities contained in the latest version of the James City County Guidelines for Design and Construction of Stormwater Management BMPs" ("County BMP Manual"). Furthermore, Section 23-10(a) of the Ordinance requires stormwater management plans for plans of development. Structural BMPs are required for certain plans of development and BMPs shall be designed and constructed in accordance with guidelines established by the manager, including the County BMP Manual.

In the latest version of the County BMP Manual, there are seven types of acceptable BMPs used in the County to treat stormwater runoff. The seventh one, Open Space, is allowed but must meet the conditions outlined in the manual to receive stormwater credit. These conditions are:

- 1) The area cannot be disturbed during project construction; and
- 2) Must be protected by limits of disturbance clearly shown on the construction drawings; and
- 3) Must be located within an acceptable conservation easement or other enforceable instrument that ensures perpetual protection of the proposed area, and the easement must clearly specify how the natural area vegetation shall be managed. Managed turf is not an acceptable form of vegetation management.

The developer of this subdivision used multiple types of BMPs to gain stormwater management compliance, including the intentional use of natural open space per the County BMP Manual. The natural open space was duly recorded in a Deed of Easement as previously noted. Therefore, the natural open space falls under Section 23-9(b)(8) performance standards and stormwater management plan criteria, Section 23-10(4), of the Ordinance.

Under Section 23-17 of the Ordinance, an owner of property subject to an administrative decision, order, or requirement under this chapter may appeal by submitting a written application for review to the board no later than 30 days from the rendering of such decision, order, or requirement. The board shall hear the appeal as soon as practical after receipt of the application.

Staff Guidance and Recommendations

Staff has reviewed the appeal and violation documents and offers the following information for the Board's consideration.

- 1) Mr. John Robillard is currently the owner of the property, 87 Kestrel Court, where violations of the resource protection area and natural open space easement have taken place. In a statement submitted to the Board, Mr. Robillard offers the following information in support of the appeal:
 - a) He bought the property with the current yard dimensions and conditions; and

- b) Has done improvements to his property that enhances the RPA; and
 - c) Specifically purchased property because of the backyard and the structures within it; and
 - d) Removed structures in backyard because of poor condition with the intent to replace them; and
 - e) Any (required) mitigation has already been done (corrected erosion, added planted material in existing tree line, stop using pesticides and chemicals, removed trash from RPA, hired a lawn care company that abides by the Turf Love program).
- 2) The Deed of Easement for Natural Open Space was recorded on 23 January 1996 in the Clerk's Office of the Circuit Court of the City of Williamsburg and County of James City in Deed Book 711, Pages 662, 663, 664, 665, and 666.
- 3) The Deed of Easement states that the "Grantor wishes to preserve land as natural open space as part of the Grantor's efforts to improve the quality of stormwater runoff from the property."
- 4) The restrictions outlined in the Deed of Easement and the restrictions which the Grantee (County of James City, Virginia) is hereby entitled to enforce, shall be as follows:
- a) No building or structure shall be built or maintained on the Easement Property other than such building or structure approved by the County Engineer, in writing;
 - b) The Easement Property shall be kept free and clear of any junk, trash, rubbish or other unsightly or offensive material;
 - c) No new signs, billboards, outdoor advertising, road or utility lines shall be placed on the property without the expressed written consent of the County Engineer;
 - d) The Easement Property shall remain in its natural condition with respect to natural leaf litter or other ground covering vegetation, understory vegetation or shrub layer, and tree canopy. The activities of Grantor within the Easement Property shall be limited to those which do not remove or damage any vegetation or disturb any soil. Such activities include selective trimming and pruning which will not alter the natural character of the Easement Property. Grantor may install walk trails or remove dead, diseased, poisonous or invasive vegetation with the expressed written consent of the County Engineer;
 - e) Grantee and its representatives may enter upon the Easement Property from time to time for inspection, to enforce the terms of the Easement and to post a sign or marker identifying Grantee's interest in the Easement Property as natural open space;
 - f) In the event of a violation of the Easement, the Grantee shall have the right to seek all appropriate legal and equitable relief, including, but not limited to, the right to restore the Easement Property to its natural condition and assess the cost of such restoration as a lien against the Easement Property.
- 5) No plan of development, RPA buffer or Natural Open Space easement modification plan was submitted to the County for review and approval as is required by the Ordinance and Deed of Easement.

Under Section 23-17(b) of the Ordinance, it states that "in rendering its decision, the Board shall balance the hardship to the property owner with the purpose, intent and objectives of this chapter. The Board shall not decide in favor to the appellant unless it finds:

- 1) The hardship is not generally shared by other properties in the vicinity;
- 2) The Chesapeake Bay, its tributaries and other properties in the vicinity will not be adversely affected; and
- 3) The appellant acquired the property in good faith and the hardship is not self-inflicted.”

Staff's guidance to the Board on deciding this matter is as follows:

- 1) The hardship is shared by other properties immediately adjacent to the appellant's property as well as numerous other properties within the Heron Run section of Season's Trace that have resource protection area and natural open space easements located on them.
- 2) The granting of the appeal in this case will adversely affect the Chesapeake Bay, its tributaries and other properties in the vicinity. Granting relief to the appellant resulting from a violation of the Ordinance and Deed of Easement could result in similar unauthorized actions by other property owners in the vicinity. In addition, granting the appeal will be in direct conflict with the terms of the Deed of Easement which will ensure that the subdivision is no longer in compliance with the approved stormwater management plan and will lead to a degradation of water quality in the tributaries to the Bay.
- 3) The appellant acquired the property in good faith and the hardship is not self-inflicted.

Staff contends that to be consistent with the purpose and intent of the Ordinance and the Deed of Easement, the Board should deny the appeal. The Board should also direct staff to pursue enforcement of restriction #6, which states “In the event of a violation of the Easement, the Grantee shall have the right to seek all appropriate legal and equitable relief, including, but not limited to, the right to restore the Easement Property to its natural condition and assess the cost of such restoration as a lien against the Easement Property”, if Mr. Robillard and staff cannot reach a resolution on restoration of the property within 60 days from the date of this meeting.

Attachments: Deed of Easement for Natural Open Space, Book 771 Pages 662-666
Exhibit A (from Deed of Easement), Plat Book 63, Page 49